Supreme Court, U.S.
FILED
051428 MAY 8 - 2006
OFFICE OF THE CLERK

No. _____

In The
# Supreme Court of the United States

STATE OF SOUTH DAKOTA; CITY OF OACOMA, SOUTH DAKOTA; LYMAN COUNTY, SOUTH DAKOTA,

*Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; AURENE MARTIN, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS; BILL BENJAMIN, ACTING REGIONAL DIRECTOR, GREAT PLAINS REGIONAL OFFICE, BIA; CLEVE HER MANY HORSES, SUPERINTENDENT, LOWER BRULE AGENCY, BIA; JAMES McDIVITT, DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

25 U.S.C. § 465 allows the Secretary of the Interior to acquire, in trust, "in his discretion," any amount of "lands" at any location in the Nation, on or off the reservation, for the purpose of "providing land for Indians." In this case, the Secretary seeks to acquire, in trust, 91 acres of off reservation land partially within the City of Oacoma, South Dakota. The Question Presented is:

Whether 25 U.S.C. § 465 is an unconstitutional delegation of legislative power?

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, the State of South Dakota, the City of Oacoma, South Dakota, and Lyman County, South Dakota, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.[1]

## OPINIONS BELOW

The opinion of the Eighth Circuit under review is reported at 423 F.3d 790 and reproduced here in the Appendix (App.) at 1. The order denying hearing and rehearing en banc of the court of appeals is reproduced at App. 138. The opinion of the district court granting summary judgment to Respondents is reported at 314 F. Supp. 2d 935 and reproduced at App. 25. The April 6, 2000, Memorandum of the Director, Office of Trust Responsibilities, through the Deputy Commissioner of Indian Affairs, to the Assistant Secretary-Indian Affairs, is reproduced here at App. 125. The April 6, 2000, Memorandum of Assistant Secretary-Indian Affairs to the Great Plains Regional Director essentially adopting the document identified in the previous sentence is reproduced at App. 124. The January 18, 2001, Memorandum from the Director, Office of Trust Responsibilities, through the Deputy Commissioner of Indian Affairs to the Assistant Secretary-Indian Affairs is reproduced at App. 118. The January 18,

[1] Petitioners note that another case pending before this Court raises the virtually identical issue as this case. *Utah v. Shivwits Band of Paiute Indians*, No. 05-1160 (Petition for Writ of Certiorari filed Mar. 9, 2006).

2001, Memorandum of the Assistant Secretary-Indian Affairs to the Deputy Commissioner of Indian Affairs essentially adopting the document identified in the previous sentence is reproduced at App. 116.

This controversy has been before this Court on a prior occasion. The opinion of this Court granting certiorari, vacating the circuit court decision, and remanding in the prior case is reported at 519 U.S. 919 and is reproduced at App. 57. The opinion of the Court of Appeals for the Eighth Circuit is reported at 69 F.3d 878, and reproduced at App. 64. The order denying rehearing and rehearing en banc is reproduced at App. 63. The district court decision is unreported and is reproduced at App. 94.

## JURISDICTION

The Judgment of the Eighth Circuit in this litigation was entered on September 6, 2005, the same day the opinion was filed. App. 1. Rehearing and rehearing en banc were denied on February 6, 2006. App. 138. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which

shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 3 of the Constitution gives Congress authority "[t]o regulate Commerce . . . with the Indian Tribes."

25 U.S.C. § 465 provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisitions, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, that no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392),

as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

## STATEMENT OF THE CASE

In 1990, the Lower Brule Sioux Tribe requested that the Department of the Interior place 91 acres of off reservation land owned by the Tribe into trust status. According to the United States, at that time the federal government held over 100,000 acres in trust status for the Lower Brule Tribe and its members. 1995 Petition for a Writ of Certiorari, at 8 n.3. Another 13,200 acres were owned by the federal government on the Lower Brule Reservation for tribal use. *Id.* The 1990 Indian population of the Lower Brule Reservation was 994. U.S. Census, Summary Population and Housing Characteristics, South Dakota, at 175 (1990). Thus, at the time of the application the United States held over 100 acres of land in trust for each Indian man, woman, and child on the Lower Brule Reservation.

The tribe in its 1990 application asserted that it intended to use the property as an industrial park. App. 110. The State and City objected, arguing that placing the land in trust would create civil and criminal jurisdictional problems, would result in the loss of taxes to the communities, and arguing that gaming may be the real purpose of the acquisition. App. 96-97. The Department of the Interior nonetheless approved the 91-acre off reservation acquisition. The State and City thereafter filed suit in federal court on July 13, 1992. Four months later, on November 30, 1992, the agency took the land into trust on

behalf of the tribe. App. 103. The State and City continued to press the claims they had made before the agency, and argued further that the statute lacked ascertainable standards and so violated the delegation doctrine. The district court, sua sponte, ruled that the action was required to be dismissed because the Quiet Title Act, 28 U.S.C. § 2409a, prohibited challenges to federal title to Indian trust lands. App. 106. The district court also ruled that 25 U.S.C. § 465 did not violate the delegation doctrine because the "context in which section 465 was passed clearly delineates the general policy to be applied and the bounds of that delegated authority." App. 113. The court explained further that the purpose of the statute was to "acquire land for Indians to help reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more self-sufficient, both economically and otherwise." *Id.*

The Eighth Circuit reversed. App. 64. As to the constitutional issue, the Eighth Circuit concluded that 25 U.S.C. § 465 provided for "unrestrained power" (App. 77) and that there were

> no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be 'for Indians.'

App. 70. The court found further that the language of the statute would permit the Secretary to acquire a "factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe" and that its "literal terms" allowed the purchase of the Empire State Building in trust. *Id.* The court concluded that 25 U.S.C. § 465, as enacted, resulted in "an agency fiefdom, whose boundaries were never

established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles." App. 77.

The court of appeals further explained that the "legislative history of § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.'" App. 72. Rather, the legislative history showed that Congress sought to provide "rural lands suitable for farming, grazing, and logging by Indians." App. 74. Representative Howard, a chief sponsor, explained that Section 5 would allow acquisitions for "'agricultural,'" "'stock grazing or forestry operations.'" 78 Cong. Rec. 11,730 (June 15, 1934) *quoted at* App. 73. The court observed that, nonetheless, "Congress failed to include standards [in Section 465] to reflect its limited purpose" (App. 73) and the "Secretary has responded by asserting all of the unlimited power conferred by the statute's literal language." App. 74. The court pointed further to the jurisdictional disarray promoted by the statute, finding that Congress in Section 465 determined only "one intergovernmental issue" – taxation – and left the civil and police power jurisdictional issues to be fought out between the BIA and the City and the State. App. 74-75. The result, according to the court, was a "legislative void." App. 75. The court found that the extent to which lands taken into trust are freed from the restraints of the State and local police power should be determined in the first instance by Congress, "not the BIA, and indeed not the courts. . . ." *Id.*

Judge Murphy dissented on the constitutional question, finding that it was reached prematurely and that, in any event, the "text" of the statute, its "historical context," and its "legislative history" provided sufficient boundaries. App. 79, 83-84. Judge Murphy nonetheless would have

reversed the holding of the trial court with regard to the Quiet Title Act, finding that it does not prevent a litigant from challenging, under the Administrative Procedures Act, a decision to take land into trust. App. 92-93. The federal Petition for Rehearing and Rehearing En Banc was denied. App. 63. Of the eleven active judges, four would have granted rehearing. *Id.*

The Department of Interior thereupon sought to save the statute, filing a Petition for Certiorari and promulgating an emergency rule "[i]n response" to the 1995 decision of the Eighth Circuit. 61 Fed. Reg. 18,082 (Apr. 24, 1996). The emergency rule provided that the Secretary would take land into trust only thirty days after a final decision had elapsed. *Id.* In addition, the United States backtracked on the argument it had previously successfully made in the lower courts that acquisitions under Section 465 were unreviewable under the Administrative Procedures Act because such acquisitions were "committed to agency discretion" by law. 5 U.S.C. § 701(a)(2). 1995 Petition for Writ of Certiorari, at 24. *See Florida Dep't of Business Regulation v. Dep't of Interior*, 768 F.2d 1248, 1255-57 (11th Cir. 1985). Based on its new regulation and on its admissions, the United States asked this Court to vacate the determination of the Court of Appeals for the Eighth Circuit and to send the case back to the Secretary. This Court granted the request. *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996). App. 57. Justices Scalia, O'Connor, and Thomas dissented, commenting that the decision to "grant, vacate and remand in light of the Government's changed position" was "unprecedented and inexplicable." 519 U.S. at 921. App. 59. The dissenters

noted that they failed to apprehend "how the availability of judicial review has anything to do" with whether or not the IRA impermissibly delegated legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). App. 60.

The Department of the Interior thereafter formally removed the land from trust status and the tribe filed an amended application that the off reservation land be taken into trust, essentially proposing that trust status was necessary to develop a "Circle of Tipis" as part of a Native American scenic byway. Administrative Record (AR) 129, 236-37.

The State, in opposition, submitted evidence that placing land in trust was not economically beneficial as claimed because trust status increases the cost of management decisions and the restrictions on alienation constrain the use of land as collateral in capital markets. AR 331-32. *See* Terry Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians*, 121-24 (1993). The State raised again its concern that placing land into trust causes jurisdictional conflicts (AR 336-37), that the tribe's purpose in using the land was indefinite (AR 334), and that the tribe most likely had not disclosed that its real purpose was gambling. AR 341-43. The City argued that the grant of trust status to the tribe would create an "artificial barrier stifling the natural growth of the community," which is already confined by other factors (AR 619-21) and both local units of government expressed concerns relating to lost taxes and unfair competition. AR 627-28.[2]

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[2] During the process, on December 15, 1998, Governor Janklow told Interior that "[b]ased on their new business plan" and the assurance that the tribe would not engage in gaming, "we" supported the tribe's

(Continued on following page)

Thereafter, the Director, Office of Trust Responsibilities, on April 6, 2000, forwarded a memo through the Deputy Commissioner of Indian Affairs to the Assistant Secretary-Indian Affairs, in which he advised taking the Oacoma land into trust (App. 125), and a notice was published in the Federal Register on May 18, 2000, of intent to take land into trust. AR 1409.

On June 16, 2000, South Dakota, the County, and City filed a Summons and Complaint in federal court. The Complaint asserted the unconstitutionality of the Act on delegation grounds, attacked the lack of compliance with the National Environmental Policy Act and challenged the compliance of the agency with its own regulations.

After the Complaint had been filed, the BIA backed up once again, and retreated from its stance that no environmental assessment need be done. The district court granted the BIA's motion for extension of time to allow it to conduct an environmental review, which was finally issued on December 14, 2000.

Two days before George W. Bush took the oath of office as President of the United States, on January 18, 2001, the Assistant Secretary-Indian Affairs, ratified the April 6, 2000, decision taking 91 acres of land in Lyman County

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"application for trust status." AR 827. Five months later, the tribe reversed its stance on land use and told the BIA that there "will be no immediate change in land use of the Oacoma land." AR 831. The BIA Realty Specialist in Washington, DC, alertly asked the local BIA if the Governor had been "informed of the change in land use" and asked "does he still support the application?" AR 976. The record does not reveal any further inquiry of the Governor, *see* AR 979. In any event, no question has been raised relating to the authority of the Attorney General to pursue its attack on the acquisition and Governor Michael Rounds supports this Petition.

into trust for the Lower Brule Sioux Tribe. App. 116. On January 26, 2001, the notice was printed in the Federal Register. 66 Fed. Reg. 7,925 (Jan. 26, 2001). AR 1566.

After the completion of the environmental review and the publication of the notice in the Federal Register, the case was allowed to proceed in district court. The district court upheld the Secretary's decision and rejected the nondelegation challenge, finding four factors which limited the Secretary's authority sufficiently to defeat a constitutional attack. First, the district court found that the policy of "acquisition of lands for Indians" served the purpose of "'conserv[ing] and develop[ing] Indian lands and resources'"; second, the Secretary was limited in that he may "only provide land for Indians"; third, the Secretary was limited by the $2 million that can be appropriated to acquire such land; and fourth, the Secretary could not use any funds to acquire land for Navajos outside of the Navajo Indian Reservations in Arizona and New Mexico. App. 53. The district court found similarities between the Clean Air Act, which permitted the "Administrator to set air quality standards that 'are requisite to protect the public health,'" and the IRA which "permits the Secretary to acquire land in trust for Indians 'to conserve and develop Indian lands and resources.'" App. 55. The district court also indicated that the "Circle of Tipis" had been built on the land proposed to be taken into trust. App. 34, 45.

The court of appeals affirmed. App. 1. The court found that this Court had struck down statutes on "delegation grounds on only two occasions." App. 6. Those statutes, according to the court, had been enacted in a "unique

political climate and delegated to the President exceptionally broad control over the national economy." App. 7.

The court of appeals found that, following the two decisions striking down statutes on delegation grounds, this Court had given "'narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'" App. 7 (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989)). The court relied on what it perceived as similarities between this case and this Court's decision in *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-17 (1943) in which this Court had found an "intelligible principle" in the requirement of the Act that the "agency should promulgate regulations encouraging effective use of radio in the 'public interest, convenience or necessity.'" App. 7-8. The court also relied heavily on the dissent of Judge Murphy in 1995 to find "guidance" in the "language of § 465." App. 12. According to the court, such "guidance" was found in the text to the Act directing that "'any land acquired must be for Indians'" and in that it "'authorizes the appropriation of a limited amount of funds with which land could be acquired and specifically prohibits use of such funds to acquire land for Navajo Indians outside of their established reservation boundaries.'" App. 12. The court rejected the State's arguments that the "textual limitations are artificial because any acquisition could be seen as 'for Indians,' regardless of who it harmed." App. 12. The court also rejected the State's arguments with regard to funding. The court acknowledged that the statute's funding limits are presently "irrelevant," but stated that they were not "meaningless when the IRA was enacted." App. 12.

The court of appeals also found meaning in the legislative history of the Act. App. 12. The court found that the "legislative history frequently mentions landless Indians" (App. 13), but did not "believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians." App. 13-14. The court also acknowledged that members of Congress believed that "giving land to landless Indians would enable them to farm or work in stock grazing or forestry operations" but found further that the "statutory language and the expressions of purpose for section 5 in the reports indicate that Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support." App. 14.

The court of appeals thus

> conclude[d] that an intelligible principle exists in the statutory phrase 'for the purpose of providing lands for Indians' when it is viewed in the statutory and historical context of the IRA. The statutory aims of providing land sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to the Department.

App. 14.

The State, County, and City petition for rehearing and rehearing en banc was denied, with Chief Judge Loken and Judge Gruender dissenting. App. 138.

## REASONS FOR GRANTING CERTIORARI

> *According to [John] Locke, one of the four unbreachable boundaries confining legislative authority was that: "The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . .*[3]

> *It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.*[4]

This case stands at the intersection of the nondelegation doctrine and federalism. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), this Court's most recent delegation determination, illuminates the relationship between those bedrock principles of American law. *Whitman* held that "the degree of agency discretion that is acceptable varies according to the scope of power constitutionally conferred." *Id.* at 475. An environmental regulation defining the term "'country elevators'" needs no "direction" but the promulgation of air standards that "affect the entire national economy" requires "substantial guidance." *Id.* In other words, a statute without standards, which allows a federal officer to massively and unilaterally intrude into the jurisdiction of the states, offends the constitution.

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[3] Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 4 (1982) (quoting J. Locke, *Two Treatises of Government*, 380-81 (2d Treatise) (Cambridge University Press 1960)).

[4] *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

25 U.S.C. § 465 is such a statute; it allows the Secretary of the Interior, "in his discretion," to acquire any lands, on or off the reservation, at any place within the United States, and in any amount, without reference to any limiting standard. That the statute is so bereft of standards that it embodies an unconstitutional delegation of legislative power is most clearly demonstrated by the failure of the federal government to respond to the State's claim, made repeatedly since the mid-1990s, that the statute is so vague that it is impossible to determine whether the Secretary could "acquire all or any part of the City of New York, the City of St. Louis, [or] the City of Rapid City . . . in trust." Appellants' Brief, *State of South Dakota and City of Oacoma v. United States Department of the Interior*, U.S. Court of Appeals for the Eighth Circuit, Civil No. 94-2344, at 42.

Moreover, the intrusion into state sovereignty through the acquisition power poses deep threats to federalism. The taking of land into trust deprives the states and local units of government of the authority, under the text of the statute, to tax the land; it also deprives them of the authority, under 25 C.F.R. 1.4(a), to impose any law or ordinance "zoning or otherwise governing, regulating or controlling the use of or development of any real or personal property, including water rights." To some courts, moreover, taking land into trust converts it to "Indian country" under 18 U.S.C. § 1151 with all that status entails. The potential amount of land which is subject to these intrusions is virtually limitless. Tribes now have available to them billions in casino revenues with which to purchase lands in each village, town and metropolis.

The Court of Appeals for the Eighth Circuit in the present litigation, along with both the First and Tenth

Circuits, inexplicably ignored the force of *Whitman's* guidance and treated the delegation doctrine as a deceased and not very beloved distant relative. *See Carcieri v. Norton*, 423 F.3d 45, 56-58 (1st Cir. 2005); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W 3532 (U.S. March 9, 2006) (No. 05-1160). This Court's attention is necessary to affirm the vitality of the doctrine.

## I. 25 U.S.C. § 465 IS SO DEVOID OF ASCERTAINABLE STANDARDS THAT IT EMBODIES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY TO THE EXECUTIVE BRANCH.

25 U.S.C. § 465 provides, in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire . . . lands, within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year, *Provided* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians. . . .
>
> . . .
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired,

> and such lands or rights shall be exempt from State and local taxation.

Article I, Section 1 of the Constitution vests "[a]ll legislative Powers" in "a Congress of the United States." This Court accordingly has "long . . . insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). The doctrine requires that Congress articulate the "general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946). Most recently, this Court has rearticulated the principle that when "Congress confers decision making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

25 U.S.C. § 465 fails the test of the cases. It lacks a "general policy," an "intelligible principle," and "boundaries." The text, by its plain terms, purports to vest in the Secretary unbridled "discretion" to acquire "lands" for a tribe or an Indian on or off reservation, setting (1) no limits on the location of lands, allowing, for example, an acquisition for a South Dakota tribe in Alabama, Missouri, New York or Utah; (2) no limits on the extent of such acquisitions, allowing the Secretary to take the whole of a city or even the whole of the state into trust for an individual Indian or a tribe; and (3) no limits on the purpose of such acquisitions, from golf courses, strip mines, strip malls, strip joints, to urban apartment complexes.

### A. The Text of 25 U.S.C. § 465 Provides No Boundaries.

Tracking Judge Murphy's dissent in the 1995 litigation, the court of appeals found "guidance" and "textual limitations" in the "language of § 465." App. 12. The court of appeals cited three such purported "limitations" in the text of the statute. First, court found that the scope of the statute was limited because acquisitions could be only "'for Indians.'" *Id.* The court did not explain, however, why it believed this to be a meaningful "boundary" or "limit." And it is difficult to see how it could be. That the land be acquired "for Indians" in no way limits the discretion of the Secretary to engage in the conduct at issue – acquiring land in trust for Indians. Nor does the "for Indians" language place a practical limit on the exercise of the Secretary's power under § 465. The United States has estimated the total number of American Indians and Alaska Natives at 4.4 million as of 2003. usinfo.state.gov/eur/Archive/2005/Jan/28-691277.html. If even half of these are "Indians" as defined by federal law, then 2.2 million persons are eligible to have land taken in trust for them, along with over 500 federally recognized tribal governments. *See id.*

Second, the court relied on the statutory limit of $2 million per year for the "acquisition" of lands. App. 12. As the court recognized, however, the limit is "irrelevant" because "most of the land currently taken into trust has been previously purchased by a tribe." App. 12. Indeed, the Department of Interior has acknowledged that the only way it has acquired land in trust under the statute since 1950 is when a tribe or individual has purchased land and

conveys it to the United States. 64 Fed. Reg. 17,576 (Apr. 12, 1999). The court nonetheless found the "limit" to have legal significance, stating that "[w]e disagree that these limitations were meaningless *when the IRA was enacted*. . . ." App. 12 (emphasis added).

Petitioners understand that the court is here expressing the theory that a statute which is constitutional when adopted cannot thereafter become unconstitutional as practical conditions change. This approach is without merit because the constitutional defect in 25 U.S.C. § 465 has been there from the first. The text of 25 U.S.C. § 465 has always allowed the Secretary to acquire land without cost to himself by "relinquishment [or] gift." Moreover, it makes no sense to argue that a statute which was once constitutional is always constitutional. For example, a state could apportion its legislature in an entirely constitutional manner; years later, as the population grows in some sections and shrinks in others, the formerly constitutionally apportioned legislature could certainly become unconstitutional. *See also Whitman*, 531 U.S. at 475 (identifying practical considerations for evaluating claims of the grant of excessive power to the executive).

The third point of Judge Murphy as quoted by the court is closely related to the second – the $2 million could not be used to acquire land for the Navajos outside of their reservation boundaries in Arizona and New Mexico. App. 12. This again provides no boundaries for the reasons set forth above, and for the additional reason that hundreds of other tribes and roughly two million individual Indians are eligible for acquisitions in the area outside of the Navajo reservation in Arizona and New Mexico. The court

of appeals does not, nor could it, explain how excluding one tribe from one use of the funds could possibly narrow the Secretary's untethered discretion to take land into trust anywhere in the country for all other tribes and Indians.

### B. The Legislative History of 25 U.S.C. § 465 Fails to Create a Constitutionally Sufficient "Intelligible Principle" or Constitutionally Sufficient "Boundaries."

The court of appeals also relied heavily on the legislative history to establish the constitutionally demanded standards, but its approach lacks merit. First, the very statement of the nondelegation doctrine denies reliance on legislative history. According to *Whitman*, 531 U.S. at 472, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Legislative history is assuredly not a "legislative act" laid down by "Congress." *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, ___ U.S. ___, 125 S.Ct. 2611, 2626 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history.").

Second, the court of appeals rejected the clearest and most unequivocal messages of the legislative history. The court of appeals, for example, properly acknowledged the frequent references in the legislative history to the purchase of land for "landless Indians." App. 13-14. Moreover, the court of appeals acknowledged that the "most common application of the statute" was envisioned to be "giving land to landless Indians [which] would enable them to farm or work in stock grazing or forestry operations." App. 14. Yet, this central thread of the legislative history was

rejected as limiting the authority of the Secretary – neither the text of the act nor the court below suggests that the statute is limited to providing land for landless Indians or that acquisitions are confined to those for farms, stock grazing or forestry.

Instead of taking the smaller step of simply adopting, as the limits of the statute, the finite purposes it identified, the court determined to rewrite the statute with much broader purposes untethered by the central threads of the legislative history. Relying on unspecified "statutory language" and on "expressions of purpose for section 5 in the reports," the court concluded that the "statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy" formed the boundaries of the operation of the statute and "sufficiently narrow[ed] the discretionary authority granted to the Department." App. 14.

There are three major problems with the court's approach. First, Section 465, as rewritten by the court, still lacks an "intelligible principle" and constitutionally adequate "boundaries." Under the court's decision, the Secretary would still be allowed to purchase, on behalf of a small South Dakota tribe, land up and down the boundaries of Central Park in New York City, or land in Alabama, Missouri or Utah for a golf course, apartment complex, or strip joint. Virtually any acquisition of land in trust for Indians could benefit them economically and thereby "enable Indians to achieve self-support"; further, even a BIA land acquisition that somehow does not accrue to an Indian's "self-support" can be seen as "ameliorating the damage resulting from the prior allotment policy."

Second, the attempt of the court below to rely on legislative history was deficient in that it ignored entirely the development of the legislation. The original bill which was to constitute the IRA provided for Indian lands in Title III. *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., 8 (1934) (hereinafter House Hearings). Section 1 of Title III set out a detailed declaration of policy. *Id.* Section 6 of Title III required the Secretary to "make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals" and to make "such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands." *Id.* at 8-9. He was further to classify areas which were "reasonably capable of consolidation" and to "proclaim the exclusion from such areas of any lands not to be included therein." *Id.* at 8. Section 8 allowed the tribe to acquire the interest of any "nonmember in land within its territorial limits" when "necessary for the proper consolidation of Indian lands." *Id.* at 9. Under Section 16, the lands were not to be subject to taxation "but the United States shall assume governmental obligations of the State or county in which such lands are situated with respect to the maintenance of roads across such lands, the furnishing of educational and other public facilities," for fire control and protection of the public health and order in the lands and for other purposes. *Id.* at 11. Jurisdictional measures were provided in Title IV.

The original bill thus at least made an attempt at articulating basic policy choices and imposing real boundaries. Nonetheless, these policy choices and boundaries were

resoundingly rejected by Congress, and the bill was entirely rewritten by those "who objected most strenuously to the original" bill. 78 Cong. Rec. 11,732 (June 15, 1934). *Compare* House Hearings at 1-14 *and* 48 Stat. 984 (1934). The detailed statement of general policy for the Act as a whole set out in the original Title I, Section 1 was eliminated. Section 1 of Title III, which had set out a comprehensive land policy, was entirely deleted, along with Section 6 of which had provided for the "orderly and sound acquisition and consolidation of lands." Section 7 of Title III, the predecessor to 25 U.S.C. § 465, was stripped of standards and renumbered Section 5. The language of Section 8 of Title III, quoted above, was eliminated.

Furthermore, Section 16 of the original Title III was essentially eliminated and Congress put in limbo the question of whether it would "assume . . . governmental obligations of the state or county" with regard to any newly acquired lands. Of course, states continue to expend significant funds for schools, roads and social services in areas with high proportions of nontaxable trust land. Likewise, the detailed jurisdictional provisions of Title IV were eliminated. Because Congress deliberately eliminated all intelligible standards from the text of the original bill, it cannot be said that Congress has articulated them in the 1934 legislative history.

### C. The Decisions of This Court Give No Support to the Opinion of the Eighth Circuit.

As noted above, the nondelegation doctrine – that Congress may not constitutionally delegate its legislative

Power to another branch of government – derives from Article I, Section 1 of the Constitution: "All legislative Powers granted herein shall be vested in a Congress of the United States." Congress can thus exercise the legislative power "granted herein" but it cannot delegate that power. *Loving v. United States*, 517 U.S. 748, 758 (1996). Nor does either of the other branches have an independent constitutional claim to legislative power.

This Court accordingly has struck, on nondelegation grounds, two statutes enacted by the same Congress which enacted Section 465. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In each case, the 1934 Congress had failed to "articulate any policy or standard that would serve to confine the discretion of authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7.

Similarly, when Congress in 1934 enacted Section 465, it failed to articulate any such policy or standards to "confine the discretion" of the authorities to whom it had granted power. Indeed, it is significant, and perhaps dispositive under *Mistretta*, that each acquisition under Section 465 is made by the Secretary, in the words of the statute, "in his discretion."

The most recent reaffirmation of the nondelegation doctrine declares anew that, to survive constitutional scrutiny, the "'legislative act'" must lay down an "'intelligible principle to which the person or body'" must conform. *Whitman*, 531 U.S. at 472. Such an intelligible principle was found within the text of the statute at issue

in *Whitman* in that it (1) required that the EPA establish "'uniform national standards at a level that is requisite to protect the public health from the adverse effects of the pollutant in ambient air'"; (2) confined the EPA authority to a "'discrete set of pollutants'" and (3) required that the EPA analysis be based on "'published air quality criteria that reflect the latest scientific knowledge.'" 531 U.S. at 473. Further, the term "requisite" confined the scope of the action to "sufficient but not more than necessary." *Id. See* 42 U.S.C. § 7409.

In contrast, the court below relied on the virtually meaningless "statutory phrase 'for the purpose of providing land for Indians'" to find an "intelligible principle" (App. 14) and the lynchpin of its analysis seemed to be the thesis that cases such as *National Broadcasting* established that key phrases in a statute can provide such a principle. App. 7-8. The court below, however, missed the meaning of that decision.

In *National Broadcasting*, 319 U.S. at 215-17, the Court did not rely on the bare phrase "public interest" as setting the boundaries and meaning of the licensing authority which could be exercised. The scope of permissible authority was further defined, by the text of the statute, to be "the interest of the listening public 'in the larger and more effective use of radio.'" 319 U.S. at 216 (quoting Section 303(g) of the Act.) Statutory language also required that "'licenses, frequencies, hours of operation'" should be divided, among the "'States and communities'" so as to "'provide a fair, efficient, and equitable distribution of radio service.'" 319 U.S. at 215 (quoting Section 307(b)). Moreover, the phrase "public interest"

carried with it meaning from the case law: "'An important element of public interest and convenience affecting the issuance of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.'" 319 U.S. at 216 (quoting *Federal Communications Comm. v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). *See also Federal Communications Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) ("relative advantages in service" part of public interest test).

Neither *Whitman* nor *NBC* give support to the thesis that meaning can be inserted into an ambiguous phrase of a statute by vague passages of legislative history. Rather, statutory text and prior cases defining particular terms of art can provide constitutional meaning sufficient to overcome a delegation challenge. No text or prior cases do so with respect to 25 U.S.C. § 465.

## II. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENT.

In *Whitman*, this Court made clear that the broader the scope of power in question, the more guidance Congress must provide to the executive branch to satisfy the nondelegation doctrine. 531 U.S. at 475. Few powers are broader, or strike more at the heart of our federal system of government, than the Secretary's unbridled power to take land into trust "for Indians."

Under 25 U.S.C. § 465, the Secretary of the Interior is allowed discretionary authority to unilaterally invade the

jurisdiction of the State and permanently deprive it, not only of its taxing authority under the text of the statute, but also of the very substance of its jurisdictional authority. The BIA claims, in 25 C.F.R. 1.4(a), that the acquisition of land in trust deprives the states and localities of their ability to zone, govern, regulate, or control the use of or development of any real or personal property, a devastating attack on state and local authority when the land is off reservation. Some courts have gone further and found that the acquisition of off reservation land in trust converts that land into "Indian country." *See, e.g., United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999).[5]

The location of land, moreover, which could be taken into trust is virtually unlimited. As noted above, South Dakota has time and again given opportunities to the United States government to deny that acquisitions for a small South Dakota tribe of land at various places around the country, including land around Central Park in New York City, would somehow be forbidden. The United States cannot and will not deny that acquisitions of land for any purpose at any location for any tribe or Indian are forbidden under the Act. They are, in fact, all within the "discretion" of the Secretary of the Interior, under his view.

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[5] The question is unresolved in the Eighth Circuit. One federal district court has recently found that placing off reservation land in trust converts it into Indian country. *South Dakota v. Department of the Interior*, 401 F. Supp. 2d 1000, 1010 (D.S.D. 2005) (appeal pending). The Court of Appeals for the Eighth Circuit, however, has not, in the view of the State, yet acquiesced in that position. *United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997).

Nor does the text of the statute restrain the amount of land which can be taken into trust. In 1999, the Department of the Interior estimated an annual number of on reservation applications for land in trust at 6,594 and off reservation trust acquisitions at 278. 64 Fed. Reg. 17,575 (Apr. 12, 1999). In that year, however, gaming revenues were but 9.8 billion; 2004 revenues were 19.4 billion, a doubling of the 1999 revenues. *See* www.nigc.gov/TribalData/GamingRevenues20031999/tabid/106/Default.aspx; www.nigc.gov/TribalData/GamingRevenues20042000/tabid/549/Default.aspx. This huge, and rapidly expanding, bonanza from gambling is available to tribes to acquire land in every village, town, and city in the United States. Scholars emphasize the tribal members' understanding of themselves as possessing a special relationship to the land and tribes have begun to and will no doubt markedly increase the rate at which they acquire lands. *See, e.g.*, Frank Pommersheim, *Braid of Feathers*, 33-34 (1995). *See also Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition* (R. Strickland et al. eds., 1982) at 471: "Real estate holdings are the single most important economic resource of Indian tribes." That tribes are able to acquire land wherever they want is fully within the scope of the American dream and the idea fits comfortably with concepts of federalism. When the United States, however, unilaterally takes that land into *trust*, and permanently removes it from the jurisdiction of the State, the intrusion becomes impermissible – at least when the power to unilaterally take that land has been delegated to an executive branch officer.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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